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Supreme Court of the United States

October Term, 1947

Hilarion B. Cosar,

Petitioner,

vs.

Homer B. Cosar and Dora A. Cosar,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION.

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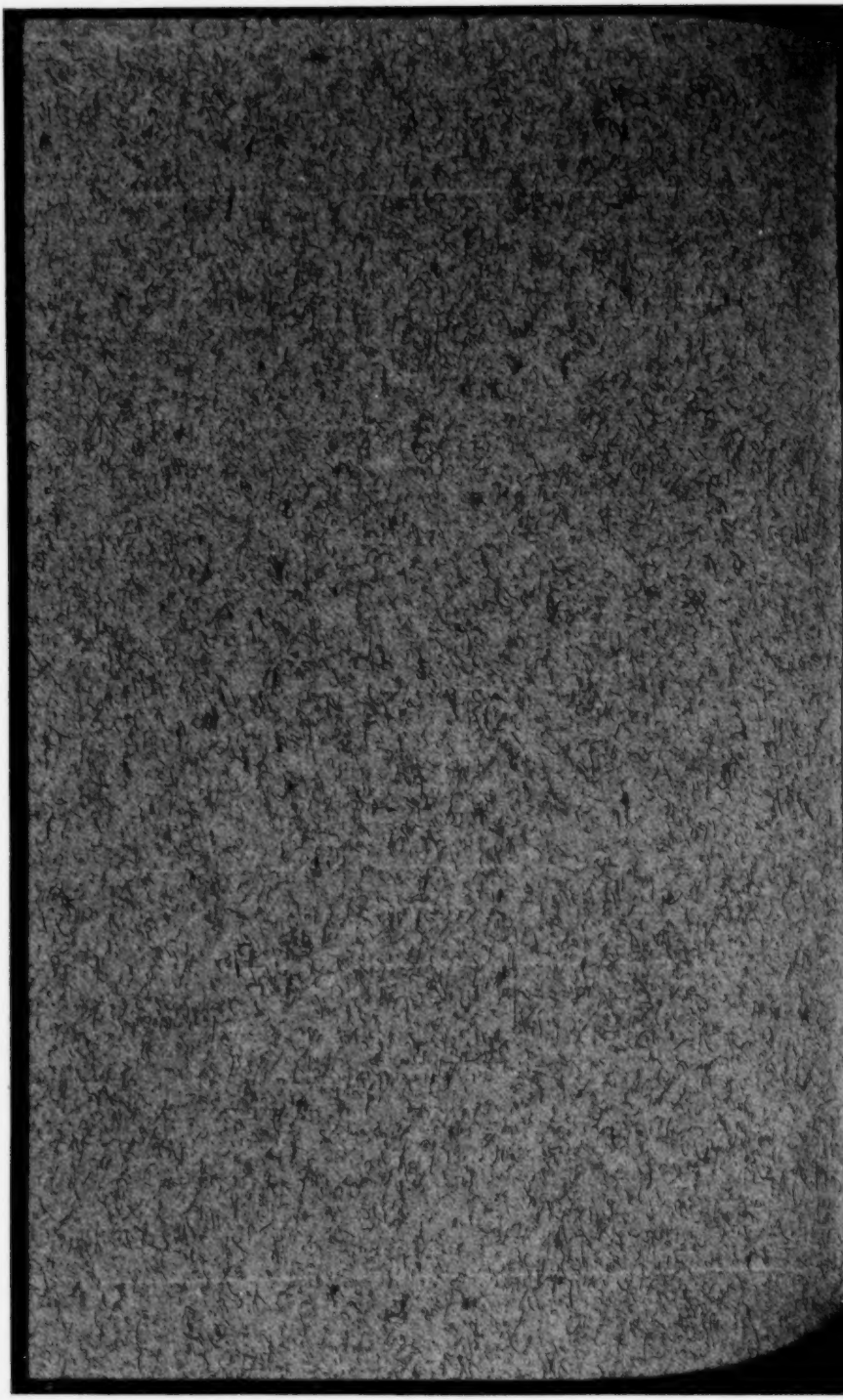

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Supreme Court of the United States

October Term, 1948

No. 658

HELENE S. COHN,
Petitioner,

vs.

MORRIS B. COHN and DORA A. COHN,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

COUNTER STATEMENT OF THE CASE

The witness Kenneth D. Lane, in addition to testifying as shown in the Petition for Certiorari, testified on cross examination R. 21,

"2. And that confidential report did not have anything specific about this National Service life insurance?

A. I don't recall any matter stated there as insurance."

The witness Wakefield testified in addition R. 22,

> "I was changing mine again, I had made out another form, and Mr. Lane did too, and Mr. Cohn went on making his out. He didn't say anything definite; on the way out as to how he had it; he said he was going to take care of his too, etc."

SUMMARY OF ARGUMENT

It is not sufficient evidence for a court to determine that a change of beneficiary has been made when the party alleging such change is unable to establish the contents of a written change of beneficiary by legal evidence as to the contents thereof, or without some writing signed by the insured showing an intention to have the beneficiary changed from that named in the policy to someone else.

ARGUMENT

The U. S. Code title 38-802 (g) provides for the change of beneficiary by the insured under the National Service Life Insurance subject to the regulations of the Veterans Administration. The Veterans' Administration pursuant thereto issued its regulation 10.3447, 7 F. R. 8364 providing that a change of beneficiary "must be made by notice in writing signed by the insured . . . "

The evidence produced by the wife of the alleged change of beneficiary was the testimony of two naval ensigns who testified, that the decedent told them he had changed the beneficiary of his insurance to his wife. There was not a single writing signed by decedent indicating such change.

The United States Court of Appeals for the District of Columbia held that such evidence was insufficient to carry the burden of proof necessary to establish a change of beneficiary.

All of the Courts are in agreement that the regulation of the Veterans' Administration is valid and fair. *Leahy* vs. *United States,* 15 F. 2nd 949; *Bradley* vs. *United States,* 143 F. 2nd 573. All of the Courts are in agreement that the burden of proof is upon the one asserting a change of beneficiary. *Leahy* vs. *United States, Bradley* vs. *United States,* both *supra; Roberts* vs. *U. S.,* 157 F. 2nd. 906.

In every case in all of the Circuit Courts of Appeal wherein an alleged change of beneficiary has been the issue, there has been uncontradicted evidence of such change and a writing signed by the insured indicating that the insured had changed his beneficiary. In each case cited by the petitioner in support of her position, an examination of the record will reveal positive proof that the insured changed his beneficiary. Such cannot be said of the case at bar.

The United States Court of Appeals for the District of Columbia in *Rosenchein vs. Citron,* 169 F. 2nd. 885, recognized that the writing signed by the insured was sufficient for the purpose of changing the beneficiary, even though it was not the form intended by the Army for that purpose, so that it cannot be said that the court was unaware of the law on the subject.

In its opinion in the case at bar, the appellate court recognized "that no particular form is necessary for that writing," and held that "the requirement that there be a writing is the minimum necessary to protect the public . . . ." The court held, ". . . any change in the formally designated beneficiaries of these policies be evidenced by some unmistakable proof that the decedent did actually make the change."

As a matter of public policy, for the protection of the decedent, there should be required of a party seeking to establish a change of beneficiary, unmistakable proof of that fact. In the instant case, it cannot be shown from the evidence that a change of beneficiary took place, or if so

whether the change was of the entire amounts of the policies, or if there were any contingent or alternative beneficiaries.

On the shadowy evidence produced by the wife, any dispassionate court would have to hold that the plaintiff failed to carry the burden of proof, and that no change of beneficiary was shown.

REPLY TO ARGUMENT OF PETITIONER

A. The Decision of the Circuit Court of Appeals Is Not In Conflict With the Decisions of Other Circuit Courts of Appeals.

1. The petitioner claims that the appellate court erred in holding that the beneficiary slip for gratuity pay was not used for the purpose of changing the beneficiary to the insurance. For this purpose she relies upon *Shapiro vs. U. S.*, 166 F. 2nd 240, and *Rosenchein vs. Citron*, 169 F. 2nd 885, decided by United States Court of Appeals for the District of Columbia.

In the *Shapiro* case, the form signed by the decedent was ambiguous, contained no language to show it was for the six month's gratuity pay, and in accordance with the language of the court, "not only was there compelling oral testimony to support this view, but the form actually signed was adequate in its language for that purpose."

In the *Rosenchein* case, the court stated: "The army intended the printed form for a purpose that was not the one Rosenchein had in mind. But the form did not disclose the Army's purpose, and was often used, as Rosenchein used it, for the purpose of designating a life insurance beneficiary."

What are the facts about the beneficiary slip in the case at bar? On the very front of the slip in bold type is found

"Under the provisions of the Act approved May 22, 1928, as extended by the Act of March 17, 1941 directing the payment of six months pay to the widow, . . . I give below the name of my wife . . . ."

With the document being so specific and directing the person to name the wife, how can a reasonable person claim that such document was used for the purpose of changing the beneficiary to life insurance? The very asking of the question answers it. The slip was designed for one purpose only, was specific, and could not be used in connection with life insurance.

An examination of the cases cited by petitioner will show not the least conflict with the decision in the present case.

2. *The court was correct in holding that the change of beneficiary must be evidenced by a writing, or its contents proven in accordance with law.*

The very regulation which permits the change of beneficiary requires that it be in writing. The regulation has been held valid by every court that has considered the question. If the change must be in writing, then certainly, it should be proven by the writing itself, or by competent proof of its contents. In each case wherein a change of beneficiary has been sustained there has been proven a writing, signed by the insured, demonstrating the change of beneficiary.

3. *The court did not hold that the Veterans' Administration regulation requiring that a change of beneficiary be in writing is for the protection of the beneficiaries.*

A reading of the lower court's opinion discloses that the court did not make the ruling stated by petitioners, nor did such question come into the case. The court merely held that the requirement of a writing afforded protection to the public, the family of the serviceman, and the serviceman himself.

In the instant case, the insurer is the United States, and there is not a shred of evidence that it ever waived the regulation providing that a change of beneficiary be in writing.

B. The Decision of the Court of Appeals Is In Strict Conformity With All Settled Rules of Law.

1. *The Court of Appeals was correct in reversing the findings of fact of the District Court, as such findings were not based on evidence.*

The only evidence to substantiate the finding that a change of beneficiary had taken place, was the impeached testimony of two officers who testified the deceased had told them he had changed his beneficiary. There was a telegram from an officer at Port Hueneme, California, that their records revealed Mrs. Helen Elner Cohn as beneficiary, but the telegram did not state what those records were, nor whether any of the records were signed by the decedent. On attempting to verify the statement made in the telegram, the record discloses, no such records could be found in the entire files of the Navy or of the Veterans' Administration.

The finding was made on the basis of impeached testimony of witnesses as to hearsay, and on a telegram based on hearsay. There was not a scintilla of legal evidence upon which to base a finding of a change of beneficiary. Under those circumstances, it is elementary that an unsubstantiated finding should be reversed. *Glenn vs. Kraft,* 82 U. S. App. D. C. 381, 164 F. 2nd 715; *Massachusetts Protective Ass'n vs. United States,* 114 F. 2nd 304; *Societe Suisse vs. Cummings,* 69 App. D. C. 154, 99 F. 2nd 387, *cert. den., Societe Suisse vs. Murphy,* 306 U. S. 616, 59 Sup. Ct. 463, 83 L. ed. 1033.

2. *The Appellate Court made no finding of facts on conflicting evidence.*

The situation in this case is not that of a decision on conflicting facts, and of a finding, thereon, but merely a finding that the moving party had failed to prove its allegation. The Court of Appeals certainly has the right to pass upon the sufficiency of evidence to substantiate a finding of fact. That is the fundamental purpose of an appellate court, to ascertain if error has been committed by a lower court, and if so, to rectify the error.

C. There Is a Basic Statutory Requirement That a Change of Beneficiary Be Evidenced by a Writing Signed by the Insured.

The code provides for the change of beneficiary by the insured, subject to the regulations of the Veterans Administration. It is in other words, a qualified right to change the beneficiaries. The Veterans Regulation provide that the change shall be in writing. This is basic. All of the cases concerning change of beneficiary are concerned with the evidence showing that a change was made, and in each and every case, it is conceded that the change must be in writing.

For the very first time, the petitioner contends that the government waived such requirement. But the record does not bear out such statement. The complaint discloses that the widow made claim to the Veterans' Administration for the proceeds of the policy, and that such claim was rejected. The Answer to the Complaint by the Government shows that it denied the allegation that the petitioner was the beneficiary of the policy.

The fact that the government is willing to abide by the decision of the courts is not a waiver of the legal requirement that the change of beneficiary be in writing. Such a claim is putting a tortured construction upon the actions of the government.

D. The Beneficiary Slip to the Six Month's Gratuity Pay Could Not Have Constituted the Act of Change Under The Proof Adduced at the Trial.

The petitioner stated in her reply brief in the United States Court of Appeals, that "It is not clear as to just what type blank was involved in the incident."

The trial court never considered the beneficiary slip as being the change of beneficiary or evidence thereof for its finding of fact stated the change to have taken place on July 13th, 1944, whereas the beneficiary slip was dated June 30th, 1944, or two weeks previous.

E. The Case Does Involve Establishing a Known Lost Document by Secondary Evidence.

In all of the cases cited by petitioner in support of her contention that this action does not involve proof of a known lost document, the courts have had before it, documentary evidence sufficient unto themselves to act as change of beneficiary. The very statute and regulation issued thereunder provides for a change of beneficiary to be in writing. Where there is no written change of beneficiary found, then, of course, the party asserting such change must establish its contents according to law. To merely state that petitioner has done the best she can, does not shift the onus on the respondent to show that no change of beneficiary was ever made. The rule is fundamental that the party asserting the existence of a fact must establish such fact. In the absence of evidence establishing the fact, such party's claim must fail for lack of proof.

The proof necessary to establish the contents of a lost document are set forth in 4 Wigmore, Evidence #1278 (3rd ed. 1940) and *Tayloe vs. Riggs,* 1, Pet. 591, 7 L. ed. 275. Not in the least did the proof in the instant case establish the change of beneficiary.

The trial court acknowledged that this action involved proof of the contents of a lost document, for on page 26 of the Appendix this colloquy took place.

> Mr. Willcher: In order to avoid further delay, we are willing to stipulate that they have been unable to find this change of beneficiary confidential slip.
> Mr. Miller: The Navy has been unable to find any change of beneficiary or confidential sheet, that is correct.
> Mr. Willcher: Confidential sheet showing the change.
> Mr. Miller: Yes, that is correct.
> The Court: That will take care of it.

The transcript of the testimony starting on page 69 will show that the trial court was going to allow petitioner a continuance of the trial to establish a basis for the offering of secondary proof to establish the lost change of beneficiary, and on the basis of the foregoing stipulation, continued with the trial and allowed secondary evidence.

For the petitioner now to state that the case did not involve establishing a known or lost document by secondary proof, is stretching the record out of shape.

CONCLUSION

It is respectfully submitted that the petition for certiorari has no merit and should be denied.

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